

STATE OF MICHIGAN
COURT OF APPEALS

JANNETTE E. YERGEAU,

Plaintiff-Appellant,

v

DONALD L. BLEICH, BLEICH & MAIS, CARL
R. BURDICK, and BURDICK & ENGELN, PLC,

Defendants-Appellees.

UNPUBLISHED
February 14, 2012

No. 301400
Berrien Circuit Court
LC No. 2009-000228-NM

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition. Because we conclude that plaintiff presented evidence sufficient to establish a genuine issue of material fact regarding whether defendants' alleged negligence proximately caused her injury, we reverse.

I. SUMMARY OF FACTS & PROCEEDINGS

This action arises from the representation of plaintiff during her divorce proceedings. In July 2007, plaintiff retained Donald L. Bleich and his law firm to initiate an action for separate maintenance against her husband of 18 years, Kenneth Yergeau. Mr. Yergeau responded by filing a counterclaim for divorce. The marital home, which is situated on a bluff over Lake Michigan, was purchased from plaintiff's family at the gift price of \$100,000; it was the largest marital asset. The other major assets were Mr. Yergeau's 401(k) retirement account, valued at about \$365,000, and a New Hampshire rental property valued at about \$252,600.

The trial court entered a scheduling order on October 4, 2007, requiring the parties to name experts and appraisers by November 6, 2007, and to complete discovery by December 24, 2007. On October 22, 2007, Bleich named Rick Miller and John Nadeau of Nadeau Appraisal Service as plaintiff's intended real estate experts. It is not disputed that at some point Bleich agreed with Mr. Yergeau's attorney to use Miller as a joint appraiser for the marital home. Plaintiff alleges that Bleich agreed to use a joint appraiser without her knowledge or consent. Miller prepared his appraisal report on January 18, 2008, in which he opined that as of that date the fair market value of the marital home was \$1,050,000. Plaintiff alleges she learned of Miller's appraisal shortly thereafter, and also learned that Bleich had agreed to use Miller as a joint appraiser.

Plaintiff found numerous errors in Miller's report and requested that Bleich obtain another appraisal. According to plaintiff, the errors in Miller's appraisal report included using the wrong street number for the property, stating the home was served by a sanitary sewer instead of a septic system, minor discrepancies in the home's general description, misreporting lakefront footage and other unspecified errors in lot and house dimensions, a disagreement regarding the effect of easements, an error labeling a photograph, the belief that Miller spent too little time inspecting the property, and a typographical error in the expiration date of Miller's appraiser's license. Unsatisfied with Bleich because he would not obtain another appraisal, plaintiff retained Carl R. Burdick and his law firm as substitute counsel on March 26, 2008. Plaintiff testified in her deposition that Burdick reviewed her complaints about Miller's appraisal with Miller, but that Miller would not alter his opinion regarding the value of the home.

According to plaintiff, Burdick assured her he would obtain a new appraisal, but he failed to ever obtain one. Plaintiff alleges that on the eve of trial Burdick informed her it was too late for a new appraisal. Burdick nevertheless filed a trial brief that Miller had not accounted for the property's unique character of being part of a family compound dependent on other property for water and septic connections. The property, Burdick argued, should be valued "more in the range of \$500,000." Plaintiff alleges that on the morning of trial, May 30, 2008, Burdick informed her that the trial judge was pressing the parties to reach a settlement, and that if a trial were held, it would be short. Plaintiff also alleges that Burdick told her that unless she agreed to a property settlement, she would lose the marital home. It is undisputed that plaintiff agreed on the record to a property settlement that awarded her the marital home valued according to Miller's appraisal.

Plaintiff later refused to approve a proposed judgment of divorce consistent with the parties' settlement. A motion for entry of the judgment was filed. Plaintiff opposed the motion based on her belief that a fair division of marital property was not achieved because it was split on a 50-50 basis, and the marital home was overvalued using Miller's appraisal. The trial court ruled that the proposed judgment accurately reflected the settlement agreement the parties placed on the record, and accordingly signed the judgment of divorce.

After her divorce was finalized, plaintiff filed a complaint for legal malpractice naming both Bleich and Burdick and their respective law firms as defendants. Plaintiff alleged that defendants' malpractice regarding the appraisal of the marital home resulted in the home being overvalued, and accordingly, plaintiff being awarded less marital property than she should have but for defendants' negligence. Specifically, plaintiff contends her divorce attorneys committed malpractice by using "Rick Miller as a joint appraiser for both parties, without [plaintiff's] knowledge or consent, and the failure of both attorneys to obtain a second appraisal." Before filing the instant malpractice lawsuit, plaintiff obtained a second appraisal of the marital home from Rico Fajardo of Nadeau Appraisal Service. Fajardo's appraisal report opined that as of September 28, 2008, the fair market value of the marital home was \$554,000.

On October 25, 2010, a hearing regarding defendants' motions for summary disposition was held. In their motions for summary disposition, defendants claimed that plaintiff was unable to establish that defendants' alleged negligence of failing to obtain a second appraisal of the marital home was the proximate cause of plaintiff's alleged injury. In particular, defendants argued that plaintiff's evidence was based on conjecture and did not support the conclusion that

without defendants' malpractice the outcome of the marital property division in the divorce case would have been more favorable to plaintiff. Plaintiff's counsel argued that, viewing the evidence in a light most favorable to plaintiff, the discrepancy in the two appraisals created a material question regarding proximate cause and damages for the finder of fact to decide.

The trial court granted defendants' motions for summary disposition in an opinion rendered from the bench. The trial court concluded that plaintiff's position was based completely on speculation, and that plaintiff failed to offer any evidence that the outcome of her divorce judgment would have been different if either of her attorneys had obtained a second appraisal. The trial court noted that there was nothing in the record to demonstrate that the finder of fact would have given a second appraisal any weight had a second appraisal been obtained and successfully admitted as evidence. Further, the trial court noted that plaintiff could not show that the trial court would have made a "different decision with regard to the division of the marital assets" if it would have considered a second appraisal. Accordingly, the trial court entered an order granting defendants' motions for summary disposition on November 4, 2010.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The trial court's decision regarding the motion is reviewed de novo on appeal. *Karbel v Comerica Bank*, 247 Mich App 90, 95-96; 635 NW2d 69 (2001). The moving party must specifically identify and support with evidence the issues as to which it believes there is no genuine issue of material fact, and that entitle it to judgment as a matter of law. MCR 2.116(10), (G)(4); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). The moving party may meet this burden by either submitting affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrating to the trial court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996), citing *Celotex v Catrett*, 477 US 317, 331; 106 S Ct 2548; 91 L Ed 2d 265 (1986). "If the moving party properly supports its motion, the burden 'then shifts to the opposing party to establish that a genuine issue of disputed fact exists.'" *Barnard Mfg Co*, 285 Mich App at 370, quoting *Quinto*, 451 Mich at 362. The nonmoving party must then present specific evidence, the content of which would be admissible at trial, showing that there is a genuine issue of disputed material fact. MCR 2.116(G)(4),(6); *Maiden v Rozwood*, 461 Mich 109, 121, 123 n 5; 597 NW2d 817 (1999); *Barnard Mfg Co*, 285 Mich App at 373.

When deciding a motion for summary disposition, the trial court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Quinto*, 451 Mich at 362. Where the documentary evidence fails to establish a material issue of disputed fact and the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. MCR 2.116(C)(10), (G)(4); *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

On appeal, plaintiff argues that the trial court improperly required plaintiff to meet the "case within a case" standard of causation in order to avoid summary disposition. Plaintiff

further argues that when the evidence presented is considered in a light most favorable to her, it demonstrates a genuine issue of disputed material fact in regard to causation and damages. Specifically, plaintiff argues that the evidence demonstrates that defendants' failure to obtain a second appraisal forced her to consent to a judgment that she contends overvalued the marital home. Further, she contends there is a question of fact regarding whether a second appraisal would have provided her with a reasonable basis to contest the valuation of the home and enabled her to obtain a more favorable settlement agreement or judgment after trial.

In order to defeat defendants' summary disposition motions, plaintiff had to establish that there was a genuine issue of material fact in regard to her claim of legal malpractice. To establish a claim of legal malpractice, a plaintiff must show: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

In this case, the parties focus their arguments on the third element, proximate cause, and the trial court rendered its opinion based on its conclusion that plaintiff offered only "speculation" in regard to causation and damages. It has been observed that proximate cause is "[o]ften the most troublesome element of a legal malpractice action." *Id.* at 586. The element of proximate cause includes both cause-in-fact analysis and legal cause analysis. *Id.* at 586 n 13. Cause in fact analysis considers whether "but for" the attorney's negligence the client would not have sustained damages; where legal cause analysis considers "whether the defendant should be legally responsible for the plaintiff's injury." *Id.* "Proximate cause is a question of fact that is generally to be decided by a jury." *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich App 260, 266; 506 NW2d 275 (1993).

The evidence that a plaintiff must produce in order to prevail in a legal malpractice case in regard to the proximate cause element depends on the nature of the plaintiff's legal malpractice claim. In *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981), this Court first addressed whether the "case within a case" or "suit within a suit" burden was an essential element of a claim for legal malpractice in Michigan. The "case within a case" burden requires a plaintiff to demonstrate that she would have prevailed completely in the underlying claim as a condition precedent to recovery in a subsequent malpractice action in order to satisfy the proximate cause element of a legal malpractice claim. *Id.* at 694. This Court in *Basic Food Indus, Inc*, concluded that the "'suit within a suit' concept has vitality only in a limited number of situations." *Id.* at 693. Accordingly, a plaintiff is only required to prove a suit within a suit in cases where an attorney's negligence prevents the client from bringing a cause of action, i.e. where the attorney allows the statute of limitations to run, where the attorney's failure to appear causes judgment to be entered against the client, or where the attorney's negligence prevents an appeal from being perfected. *Id.*

The parties do not dispute that the instant action is not the type of case where the suit within a suit concept is applicable; accordingly, plaintiff was not required to prove that she would have obtained a more favorable divorce judgment if a second appraisal would have been obtained in order to establish a question of fact in regard to causation. The trial court's determination that summary disposition was proper because plaintiff could not demonstrate that

a finder of fact would have found a second appraisal credible or persuasive, could not establish that the finder of fact would have divided the marital assets differently, and could not establish “that the outcome would have been predictably different” was error. While the trial court did not explicitly state that it was requiring plaintiff to prove a case within a case, it is apparent based on the trial court’s ruling that it was holding plaintiff to the case within a case burden and requiring her to prove that she would have prevailed in the underlying action in order to survive summary disposition on her legal malpractice claim.

The instant case is analogous to previous decisions of this Court reversing a trial court’s grant of summary disposition to defendants in legal malpractice cases where the case within a case concept was not applicable.

In *Espinoza v Thomas*, 189 Mich App 110, 124; 472 NW2d 16 (1991), this Court noted that in legal malpractice cases where the underlying action is terminated by settlement, “a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse.” Accordingly, this Court explained that “[w]hen a settlement is compelled by the mistakes of the plaintiff’s attorney, the attorney may be held liable for causing the client to settle for less than a properly represented client would have accepted.” *Id.* at 123. This Court concluded that summary disposition was improper because the evidence created a “reasonable inference” that the plaintiff’s actual damages were greater than the mediation award she accepted, and that she was compelled to accept the award because her attorney’s failure to timely file her claim left her with “no other recourse.” *Id.* at 121, 124.

In *Lowman v Karp*, 190 Mich App 448, 453; 476 NW2d 428 (1991), this Court concluded that the plaintiff was not precluded from maintaining a legal malpractice action where her attorney refused to try the underlying case after she informed him that she did not want to settle at a point in the proceedings where she would be unable to obtain new counsel. The plaintiff claimed that her attorney’s lack of preparedness compelled him to urge her to settle. *Id.* at 453-454. Accordingly, this Court concluded that the plaintiff was placed “in a position where settlement was her only reasonable choice despite her own reservations about the settlement,” and reversed the trial court’s grant of summary disposition in favor of the defendants. *Id.*

Espinoza and *Lowman* indicate that in order to avoid summary disposition in this case, plaintiff was required to put forth evidence showing that deficient representation created a situation where she was compelled to accept a settlement that a properly represented client would reject because she had no other reasonable recourse. This Court’s opinion in *Teodorescu* provides further guidance in regard to the evidence necessary to establish proximate cause and damages so as to defeat summary disposition in legal malpractice cases where the case within a case analysis is not applicable.

This Court affirmed the trial court’s grant of a directed verdict in favor of the plaintiff in a legal malpractice claim that arose from the defendant’s representation of the plaintiff in a divorce action. *Teodorescu*, 201 Mich App at 262. In *Teodorescu*, the plaintiff’s evidence demonstrated that the defendant attorney allowed the marital home to be included in the divorce judgment despite the attorney’s knowledge that foreclosure was pending. *Id.* at 265. The trial court awarded the plaintiff the marital home “free and clear” of the mortgage; however, it was

not aware that the home was subject to foreclose. *Id.* This court concluded that the ultimate loss of the home was “the manifestation of the injury caused by [the] defendant’s negligence.” *Id.* This Court explained that the legal component of proximate cause is often stated in terms of foreseeability. *Id.* at 266. This Court concluded that it was “readily foreseeable that [the] defendant’s failure to take steps to prevent foreclosure or to seek the inclusion of other unencumbered assets in the judgment would cause [the] plaintiff financial harm.” *Id.*

In this case, plaintiff presented evidence in the form of a second appraisal valuing the marital home at \$554,000, a value significantly less than the first appraisal that was the basis of the settlement agreement valuing the home at \$1,050,000. Plaintiff also presented evidence to demonstrate that she informed defendants that she believed the first appraisal was inaccurate and that she was requesting a second appraisal on the home. When viewed in the light most favorable to plaintiff, her evidence demonstrates that despite her urging, both Bleich and Burdick failed to obtain a second appraisal of the marital home. Further, her evidence establishes that on the eve of trial Burdick informed her that it was too late to obtain a second appraisal, and on the morning of the trial Burdick informed her that she would lose the marital home if she did not agree to settle the case. Consequently, plaintiff agreed to a settlement based on the value of the marital home calculated in the first appraisal, despite her misgivings.

This evidence creates a “reasonable inference” that plaintiff’s attorneys’ negligence compelled her to accept a settlement she would have refused had a second appraisal been obtained in a timely fashion. Further, it is clear that Burdick was unprepared to go to trial based on the fact that he never obtained a second appraisal and would have no reasonable means to attack the credibility of the first appraisal during a trial. Based on plaintiff’s evidence, it was “readily foreseeable” that defendants’ failure to obtain a second appraisal would cause plaintiff financial harm. Finally, there is sufficient evidence to create a question of fact regarding whether plaintiff would have been able to negotiate a more favorable settlement or obtain a more favorable division of the marital assets at trial but for her attorneys’ failure to obtain the second appraisal. Accordingly, plaintiff presented sufficient evidence to create a genuine issue of material fact regarding whether her attorneys’ malpractice proximately caused her damages.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello